PD-1382-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 5/10/2019 10:44 AM
Accepted 5/10/2019 11:06 AM
DEANA WILLIAMSON
CLERK

No. PD-1382-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/10/2019
DEANA WILLIAMSON, CLERK

RITO GREGORY LOPEZ, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Moore County
Court of Appeals Nos. 07-18-00084-CR through 07-18-00094-CR
Trial Cause No. 5465

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State's Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Rito Gregory Lopez, Jr.

* The trial judge was Hon. Ron Enns, 69th Judicial District, Moore County, Texas.

* Counsel for Appellant at trial was Vaavia Edwards, 301 South Polk Ave., Suite 620, Amarillo, Texas 79101.

* Counsel for Appellant on appeal was Jerod Pingelton, P.O. Box 636, Dumas, Texas 79029.

* Counsel for the State at trial and on appeal was Bryan Denham, Assistant District Attorney, 715 Dumas Ave. #304, Dumas, Texas 79029.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

No. PD-1382-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

RITO GREGORY LOPEZ, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Moore County
Court of Appeals Nos. 07-18-00084-CR through 07-18-00094-CR
Trial Cause No. 5465

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This Court has already said that the State need not prove both sexual assault and bigamy to invoke the enhancement provision in TEX. PENAL CODE § 22.011(f). Two courts of appeals misunderstood this. This Court should reaffirm its interpretation, and this time fully explain that this meaning is exactly what the Legislature enacted and should be followed as written because it is not absurd.

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant argument.

STATEMENT OF THE CASE

Appellant was indicted on eleven counts of sexual assault of a child, all enhanced to first-degree felonies under Penal Code § 22.011(f).[1] Appellant was convicted and sentenced to 25-years' confinement on each count.[2] On appeal, Appellant argued that his enhanced sentences should be reversed for insufficiency because § 22.011(f) was only meant for instances of actual bigamy.[3] The court of appeals agreed and reversed and remanded for a new punishment hearing.[4]

GROUND FOR REVIEW

Does the enhancement under Penal Code § 22.011(f) require the State to prove the defendant committed bigamy?

---

[1] CR 5-8.

[2] 3 RR 7, 42-43.

[3] *Lopez v. State*, 567 S.W.3d 408 (Tex. App.—Amarillo Nov. 20, 2018, pet. granted) (describing claim Appellant raised in oral argument).

[4] *Id.* at 413.

STATEMENT OF FACTS

Appellant repeatedly sexually assaulted his step-daughter.[5] To prove the enhancement, the State established that Appellant was married to the victim's mother during the time of the assaults.[6] It did not attempt to prove a bigamous relationship between Appellant and his step-daughter. The trial court found Appellant guilty and assessed concurrent 25-year sentences.[7]

In the court of appeals, Appellant argued that applying subsection (f) to this case is contrary to legislative intent.[8] The court of appeals acknowledged "much debate" about whether the enhancement requires proof of actual bigamy or only that a defendant could not marry his victim because one of them was already married.[9] It found the main text of this Court's opinion in *Arteaga v. State*[10] contradicted

---

[5] 2 RR 93, 94, 98.

[6] 2 RR 77.

[7] CR 67-88; 3 RR 7, 42-43.

[8] *Lopez*, 567 S.W.3d at 410.

[9] *Id*.

[10] 521 S.W.3d 329 (Tex. Crim. App. 2017).

footnote 9 and was puzzled.[11] It resolved the contradiction in favor of requiring proof of actual bigamy because (1) this Court's unpublished remand order in *State v. Senn*[12] quoted *Arteaga*'s main text, not the footnote;[13] (2) the court of appeals on remand in *Senn* noted footnotes are not precedential;[14] and "[m]ore importantly," (3) it was bound by the legislature's intent and this Court determined that the legislature intended for the State to prove facts constituting bigamy.[15]

SUMMARY OF THE ARGUMENT

This Court's prior pronouncements on Penal Code § 22.011(f) do not require proof that the defendant committed bigamy for the enhancement to apply. The enhancement provides harsher punishment when a marriage between the parties is prohibited, and in *Arteaga*, this Court determined that not just any marriage

---

[11] *Lopez*, 567 S.W.3d at 412 (quoting John Wayne: "'[i]f everything isn't black and white, I say, 'why the hell not?'").

[12] *State v. Senn*, No. PD-0145-17, 2017 WL 5622955, at *1 (Tex. Crim. App. Nov. 22, 2017) (vacating and remanding in light of *Arteaga*) (not designated for publication).

[13] *Lopez*, 567 S.W.3d at 413.

[14] *Id.* at 412 (citing *Senn v. State*, ___ S.W.3d ___, No. 02-15-00201-CR, 2018 WL 5291889, at *4-5 (Tex. App.—Fort Worth Oct. 25, 2018, pet. granted)).

[15] *Id.* at 413.

prohibition qualifies; it had to be a marriage prohibition under the bigamy statute. It also said in *Arteaga* and *Estes v. State* that the literal language of the enhancement does not require the commission of bigamy. The plain language requires only that marriage (or purporting to marry or living under the appearance of marriage) with the victim be prohibited by the bigamy statute—which occurs whenever the victim or the defendant is already married. Even if the reference to the bigamy statute and the legislative history point toward an intent to create an enhancement only for bigamists and polygamists, because the broader, but plain and unambiguous language is not absurd, this Court should follow it.

ARGUMENT

Statute at issue.

> [A]n offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.
>
> TEX. PENAL CODE § 22.011(f).

***Arteaga* confused two courts of appeals.**

This Court construed subsection (f) in *Arteaga*.[16] There, the State argued the

[16] 521 S.W.3d at 335.

enhancement should apply to an unmarried defendant on the theory that he was "prohibited from marrying" his daughter (the victim) under a Family Code statute prohibiting marriage between close relations.[17] *Arteaga* rejected this interpretation and held that the words "under Section 25.01" modified each of the phrases "marrying," "purporting to marry" and "living under the appearance of being married."[18] Thus, the prohibition on marrying the victim (or appearing to) must come from the bigamy statute, not some other prohibition. Specifically, the Court held: "the State is required to prove facts constituting bigamy under all three provisions of 22.011(f)" and later, "The legislature intended for the State to prove facts constituting bigamy [to establish the enhancement]."[19] In footnote 9, the Court explained:

> When we discuss "facts that *would* constitute bigamy," we do not mean that the State has to prove that the defendant committed the offenses of sexual assault and bigamy. What we mean is that . . . the State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.[20]

---

[17] *Id*. at 332-34.

[18] *Id*. at 336.

[19] *Id*. at 335, 336.

[20] *Id*. at 335 n.9 (emphasis in original).

The courts of appeals have split over how to interpret these statements. Both the Seventh Court of Appeals in this case and the Second Court of Appeals in *Senn*[21] understood this Court to require proof of actual bigamy; the First Court of Appeals in *Rodriguez v. State*[22] concluded it does not. This Court has granted review in all three cases.

Arteaga and _Estes v. State_[23] resolve this issue.

Arteaga could have been written more clearly. Instead of short-handing what the State had to prove to "facts constituting bigamy," it should have said "a marriage prohibition under the bigamy statute," or, as it did in other parts of the opinion,[24] "facts that *would* constitute bigamy," particularly since this is the language footnote 9 attempts to explain.

---

[21] *Senn v. State*, No. 02-15-00201-CR, 2018 WL 5291889, at *5 (pet. granted 4-10-2019, PD-1265-18).

[22] ___ S.W.3d ___, Nos. 01-17-00906-CR through 01-17-00908-CR, 2018 WL 6318471 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018) (pet. granted 4-10-2019, PD-0013-19 through PD-0015-19).

[23] 546 S.W.3d 691 (Tex. Crim. App. 2018).

[24] *Arteaga*, 521 S.W.3d at 335 (setting out the "two reasonable constructions of § 22.011(f)" —concerning what parts of the statute the words "under Section 25.01" modify—and using the phrase "the State must prove facts that would constitute bigamy" in both, alternative constructions).

Regardless, the Seventh and Second Courts of Appeals should have attempted to harmonize *Arteaga*'s statements instead of finding them irreconcilable. Statutory interpretation requires this to give due respect to the legislative branch.[25] Although the courts of appeals were interpreting a judicial opinion, they still should have presumed that a higher court's opinion was not self-contradictory.

Further, it is not difficult to harmonize *Arteaga*'s statements. When the main text of the opinion stated that the State had to prove "facts constituting bigamy under all three provisions of 22.011(f)," the court of appeals should have reasonably understood this as interchangeable with the phrase "facts that would constitute bigamy" and as only addressing the issue in the case: that bigamy applied to each provision. It is reasonable to expect that side issues—like what this meant for cases other than Arteaga's—would be taken up in a footnote. This is how the court of appeals should have interpreted footnote 9. It is attached to the first use of the phrase

---

[25] *Ex parte Perry*, 483 S.W.3d 884, 902–03 (Tex. Crim. App. 2016) ("we presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible"); Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at 180 (2012) ("The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves (in the absence of duress). Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.").

"facts constituting bigamy," and explains what the phrase means for a situation just like this: the State need not prove actual bigamy.

The court of appeals was wrong to disregard footnote 9 solely because it was a footnote. Contrary to the court of appeals's assertion, this Court has not given a "directive" "instructing [the court of appeals] of the non-precedential value afforded footnotes and concurring opinions."[26] In *Young v. State*, this Court indicated that footnotes "generally" contain dictum.[27] And in *Gonzales v. State*, it explained (in a footnote) that while it had "intimated" that the Court was not bound by its holdings in footnotes, it never said it was not bound by a higher court's footnotes.[28]

It was also unreasonable for the court of appeals to conclude that, by quoting *Arteaga*'s "facts constituting bigamy" main text rather than footnote 9, the *Senn* remand order was signaling any position on the question at issue here. The lower court in *Senn* concluded that the phrase "under Section 25.01" did not modify

---

[26] *Lopez*, 567 S.W.3d at 412.

[27] 826 S.W.2d 141, 144 n.5 (Tex. Crim. App. 1991).

[28] 435 S.W.3d 801, 813 n.11 (Tex. Crim. App. 2014).

"prohibited from marrying,"[29] and thus it was appropriate to cite *Arteaga*'s main holding—not the footnote.

Instead of the unpublished remand order, the court of appeals should have resolved any lingering confusion about the meaning of *Arteaga* by looking at *Estes v. State*, which said this Court had already "acknowledged that the literal language of Section 22.011(f) accomplishes more than merely punishing actual instances of bigamy."[30] *Estes* stated:

> We have interpreted Section 22.011(f) as essentially requiring proof 'that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.'[31]

These were not offhand statements. Estes claimed that applying the enhancement to him as a married person treated married offenders more harshly than unmarried ones in violation of equal protection.[32] If, as the court of appeals held here, the enhancement did not apply because actual bigamy is required, then that would have

---

[29] *Senn v. State*, 551 S.W.3d 172, 177 (Tex. App.—Fort Worth 2017), judgment vacated, PD-0145-17, 2017 WL 5622955 (Tex. Crim. App. Nov. 22, 2017).

[30] *Estes*, 546 S.W.3d at 699 (citing *Arteaga*'s footnote 9).

[31] *Id.*

[32] *Id.* at 694-95.

been the result of *Estes*. Holding that there was a rational basis for different treatment based on marriage status[33] reaffirms that this is indeed how the statute operates.

The plain language of subsection (f) does not require actual bigamy, only a bigamous prohibition.

While this Court can simply reaffirm its interpretation that subsection (f) does not require proof of actual bigamy, for the benefit of the courts of appeals, it might explain how it arrived at this conclusion. To this end, it bears repeating that subsection (f) raises sexual assault to a first-degree felony if the victim is a person whom the actor was prohibited from:

- marrying [under Section 25.01];
- purporting to marry [under Section 25.01]; or
- living with under the appearance of being married under Section 25.01.[34]

---

[33] *Id.* at 700-01.

[34] *Arteaga*, 521 S.W.3d at 336.

If the defendant is already married to someone other than the victim, Section 25.01 prohibits him from marrying her (or purporting or appearing to do so).[35] Thus, the literal, plain meaning of the legislature's words apply to Appellant's situation.[36]

Instead of requiring a *violation* of Section 25.01, the enhancement requires that marriage (or purporting or appearing to marry) be "prohibited" under the bigamy statute. Webster's Dictionary defines "prohibit" as "to forbid by authority: enjoin" and "to prevent from doing something" or "preclude."[37] Using the word "prohibit" signals that the conduct be forbidden—not that it be accomplished. Pairing the word with "under Section 25.01" confirms this understanding because prohibiting is just what penal code offenses do: the penal code's purpose is to "establish a system of *prohibitions*, penalties, and correctional measures . . . ."[38] Indeed, the offense immediately following bigamy expressly has as its title "Prohibited Sexual

---

[35] TEX. PENAL CODE § 25.01(a)(1). It also prohibits someone who knows another is already married from marrying, purporting to marry, or living with that other person under the appearance of being married. *Id*. § 25.01(a)(2).

[36] *See Estes*, 546 S.W.3d at 700 (stating that § 22.011(f) was plainly broad enough to cover conduct of similarly situated married defendant).

[37] Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/prohibit (last visited May 7, 2019).

[38] TEX. PENAL CODE § 1.02 (emphasis added).

Conduct."[39] So in requiring that the victim be someone the defendant "was prohibited from marrying . . . under Section 25.01," the enhancement does not require the defendant to have married his victim, just that the bigamy statute must forbid it.

The enhancement and bigamy statute operate differently. Consider how a factfinder would apply them. For the latter, the operative question is: "Did the actor marry, purport to marry, or appear to marry in violation of subsection 25.01?" It requires the conduct be carried through. Subsection (f), in contrast, asks only the hypothetical: whether marriage, purporting to marry, or appearing to marry is prohibited. Its focus is on the prelude—what could become bigamy.

The language of subsection (f) does not lend itself to a contrary interpretation that requires only actual bigamy. Had a majority of the legislature wanted this, it could have passed a bill that said: "an offense under this section is a felony of the first degree if the victim was a person whom the actor married or purported to marry or with whom the actor lived under the appearance of being married in violation of Section 25.01." It used this sort of language in the amendments to bigamy, which

---

[39] TEX. PENAL CODE § 25.02.

were passed as part of the same bill that created subsection (f).[40] But it did not do so here. The democratically-enacted language must control.[41]

It may be tempting to divine a legislative intent that the statute be more circumscribed than it is.[42] It could be argued, "Why reference the bigamy statute unless the Legislature's *real* aim was bigamous situations?"[43] But this would allow

---

[40] Act of 2005, 79th Leg., R.S., ch. 268, § 4.03 (S.B. 6) (*amending* TEX. PENAL CODE § 25.01(c) *to read* "It is a defense to prosecution . . . that the actor reasonably believed at the time of the commission of the offense that the actor and the person whom the actor married or purported to marry or with whom the actor lived under the appearance of being married were legally eligible to be married" *and amending* TEX. PENAL CODE § 25.01(e) *to read* "if at the time of the commission of the offense, the person whom the actor marries or purports to marry or with whom the actor lives under the appearance of being married").

[41] *See State v. Velasquez*, 539 S.W.3d 289, 295 (Tex. Crim. App. 2018) ("it is not for this Court to add to, subtract from, or otherwise revise a democratically-enacted statute simply because we believe that our revisions would improve the day-to-day operation of the criminal justice system. Those concerns are better addressed democratically, rather than from the bench.").

[42] Perhaps the reason the court of appeals concluded as it did was that it could not ignore *Arteaga*'s revelation that, according to the legislative history, the bill intended to protect kids "from the blight of bigamy and polygamy." *Arteaga*, 521 S.W.3d at 337.

[43] *See Estes*, 546 S.W.3d at 712 (Newell, J., concurring in part and dissenting in part) ("the Legislature did not draft Section 22.011(f) to simply enhance punishment upon a showing of marriage"; "Even though the text is not limited to the commission of sexual assault pursuant to a bigamous relationship, it nevertheless provides a clear indication of 'what the legislature had in mind' when it passed this statute: enhanced punishment for sexual assault committed in the course of a bigamous relationship."). From the plain text it would appear penalizing bigamous relationships *and* defendants who sexually assaulted married victims was the statute's aim; referencing the bigamy statute accomplishes both.

a judge's own views of the "real" purpose or intent of the statute to override its unambiguous text. The legislature passed this language. The statute's admittedly broad, yet plain, meaning should control unless it would lead to absurd results that the legislature could not possibly have intended.[44]

Broad but not absurd.

The scheme as a whole is not absurd since sexual conduct prohibited by § 22.011 is arguably worse when the law would not countenance a formalized relationship between the parties (*i.e.*, marriage) because one or both of them are already married. It is also not absurd that in voting for the bill creating subsection (f) legislators wanted to penalize married rapists more harshly. As this Court held in *Estes*, it is perfectly rational to conclude "that marriage bestows upon its participants a certain aura of trustworthiness, specifically in regard to children" and that a higher degree of punishment should be reserved "for those who would defile that trust by using it to sexually assault a child."[45] Although *Estes* did not consider the situation

---

[44] *Id.* at 700 ("the 'literal text' of a statute 'is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law.'").

[45] *Id.* at 702.

of adult victims, the aura of trust applies there, too. Potential sexual assault victims may believe they are safer with a married person because of the agreement to forsake all others.

Similarly, it is also not absurd to punish an unmarried defendant more harshly when the victim is married. Along with harming the individual victim, sexual assault also constitutes an offense against the marriage. It can strain a married couple's emotional connection and support system and interfere with the conjugal relationship.[46] When sexual assault results in pregnancy or disease, it can preempt a couple's chance at legitimate conception or even eliminate it altogether.[47]

---

[46] *See* Johanna R. Shargel, *United States v. Lanier: Securing the Freedom to Choose*, 39 ARIZ. L. REV. 1115, 1128 n.84 (1997) (reporting that experts who coined phrase "Rape Trauma Syndrome" "found that rape profoundly impacts victims' sexual relationships, which in turn affect their marriages and chances for procreation."); Major Paul M. Schimpf, USMC, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between A Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 183 (2005) (referencing studies finding that "over half of female victims of rape ultimately lose their husbands or boyfriends as a result of the psychological strain on the relationship."); *Salinas v. Fort Worth Cab & Baggage Co., Inc.*, 725 S.W.2d 701, 704 (Tex. 1987) (recounting evidence that rape resulted in impairment of victim's relationship with her husband who reacted violently to learning details of her rape by another man and who eventually abandoned his wife and children as a result).

[47] Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1040 (2018) (explaining that the odds of a female rape victim acquiring pelvic inflammatory disease is 11%, which once contracted, increases the risk of ectopic pregnancy, and for one in five women, leads to infertility).

Conclusion

This Court has already acknowledged that actual bigamy is not required to invoke the enhancement, and the court of appeals should have reconciled, not found contradiction in, this Court's statements on the matter. Now that it is before the Court again, this Court should reaffirm that actual bigamy is not required because the plain language of the statute does not require it and that result is not absurd.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the judgments of the court of appeals and affirm the trial court's judgment and sentence.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,216 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of May 2019, the State's Brief on the Merits was served electronically on the parties below.

Hon. Austen Massey
Assistant District Attorney
Moore County Criminal District Attorney's Office
715 South Dumas Ave., Room 304
Dumas, Texas 79029
69thada2@69thda.com

Hon. Jerod Pingelton
Counsel for Appellant Rito Lopez, Jr.
P.O. Box 636
Dumas, Texas 79029
patsyrenee35@gmail.com

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney